



Kentucky Journal of Equine, Agriculture, & Natural Resources Law

Volume 12 | Issue 1


Article 4

2019

A Look at How United States Immigration and Labor Policy Affect the Foreign Workforce on American Farms

Benjamin A. Dennison
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/kjeanrl>

 Part of the [Agriculture Law Commons](#), [Immigration Law Commons](#), and the [Labor and Employment Law Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Dennison, Benjamin A. (2019) "A Look at How United States Immigration and Labor Policy Affect the Foreign Workforce on American Farms," *Kentucky Journal of Equine, Agriculture, & Natural Resources Law*: Vol. 12 : Iss. 1 , Article 4.

Available at: <https://uknowledge.uky.edu/kjeanrl/vol12/iss1/4>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in *Kentucky Journal of Equine, Agriculture, & Natural Resources Law* by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

A Look at How United States Immigration and Labor Policy Affect the Foreign Workforce on American Farms

Benjamin A. Dennison*

INTRODUCTION

The average American's meal is more reliant on migrant farm laborers than most realize.¹ Undocumented migrant farmworkers plant and pick most of the fruits and vegetables that Americans eat and play vital roles on dairy and meat farms.² For centuries, individuals migrated by choice or were forcefully brought to the United States to work the fields as farm laborers.³ Over several decades, crop farm and agribusiness industries have become dependent on the influx of undocumented workers to tend farms.⁴ Since 2000, undocumented workers accounted for roughly half of all jobs in the crop farm sector.⁵ Currently, worker shortages on farms threaten agricultural sustainability.⁶ As the shortages grow, the immigration debate looms, and many undocumented workers live in fear of deportation.⁷

* Staff Editor, *Ky. J. of Equine, Agric., & Nat. Resources L.*, 2019-2020; B.A. 2017, University of Louisville; J.D. May 2020, University of Kentucky.

¹ See Mary Jo Dudley, *These U.S. industries can't work without illegal immigrants*, CBS NEWS (Jan. 10, 2019 3:55 PM), <https://www.cbsnews.com/news/illegal-immigrants-us-economy-farm-workers-taxes/> [<https://perma.cc/2KXF-MPCG>].

² *Id.*

³ Ariel Ron & Dael Norwood, *America Cannot Bear to Bring Back Indentured Servitude*, THE ATLANTIC (Mar. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/03/american-immigration-service-slavery/555824/> [<https://perma.cc/2JGZ-FDFJ>].

⁴ ERIC A. RUARK, ILLEGAL IMMIGRATION AND AGRIBUSINESS: THE EFFECT ON THE AGRICULTURE INDUSTRY OF CONVERTING TO A LEGAL WORKFORCE, FEDERATION FOR AMERICAN IMMIGRATION REFORM (2011), https://www.fairus.org/sites/default/files/2017-08/agribusiness_rev.pdf [<https://perma.cc/R83Q-G88K>].

⁵ *Id.*

⁶ Zippy Duvall, *Worker Shortage Threatens U.S. Ag Sustainability*, FARM BUREAU (Oct. 16, 2017), https://www.fb.org/viewpoints/worker-shortage-threatens-u.s.-ag-sustainability?utm_content=buffer613d0&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer [<https://perma.cc/TZ3V-897W>].

⁷ Valerie Hamilton, *Deportation Threats Worry Farmworkers and Farm Owners*, KQED (Mar. 20, 2017), <https://www.kqed.org/news/11363886/deportation-threats-worry-farmworkers-and-owners> [<https://perma.cc/95N9-2CAL>].

The United States food supply chain relies almost entirely on a small number of farms⁸ that are anchored by undocumented workers.⁹ Exemplifying this, less than six percent of farms account for seventy-five percent of total farm sales.¹⁰ Because the United States relies on select farms, their economic interests are inextricably linked to national interests.¹¹ The treatment and protection of undocumented workers under the law is a pressing issue when considering their vital importance to the United States food chain.¹²

Over the past few years, the immigration debate in the United States has moved to the front page of newspapers and the top of news broadcasts.¹³ While some call for stricter laws and enhanced border security,¹⁴ others, including the agribusiness lobby, have a different opinion.¹⁵ The agribusiness lobby consists of large scale businesses, include various types of agriculture, such as dairy, crop, fruit, vegetable, and meat farms, that earn most of their revenue from agriculture.¹⁶ According to the lobby, stricter immigration laws that aim to deport undocumented workers from the country would fracture the agriculture workforce and cause significantly increased labor costs.¹⁷ Authorized farmworker's wages, on average, are eighteen to twenty-two percent higher than their undocumented counterparts.¹⁸ These costs, although initially borne by employers, would likely be passed onto the consumers in the form of unacceptably high food and dairy prices.¹⁹ There is also

⁸ Ruark, *supra* note 4.

⁹ Ruark, *supra* note 4; *see also* Duvall, *supra* note 6.

¹⁰ Ruark, *supra* note 4.

¹¹ *Id.*

¹² *See id.*

¹³ Derek Thompson, *How Immigration Became So Controversial*, THE ATLANTIC (Feb 2, 2018), <https://www.theatlantic.com/politics/archive/2018/02/why-immigration-divides/552125/> [<https://perma.cc/G8KE-YHGA>].

¹⁴ *See* Brett Samuels, *Trump calls on Congress to change 'ridiculous' immigration laws*, THE HILL (Apr. 31, 2018, 8:25 PM), <https://thehill.com/homenews/administration/381357-trump-calls-on-congress-to-change-ridiculous-immigration-laws> [<https://perma.cc/2CCV-9CBL>].

¹⁵ Ruark, *supra* note 4.

¹⁶ *See* James Chen, *Agribusiness*, INVESTOPEDIA (Aug. 31, 2019), <https://www.investopedia.com/terms/a/agribusiness.asp> [<https://perma.cc/6TXP-AWUS>]; Dudley, *supra* note 1.

¹⁷ Ruark, *supra* note 4.

¹⁸ *Id.*

¹⁹ *Id.*

a high risk that a mass exodus of undocumented workers from the industry could cause severe unprofitability for farmers.²⁰

Such a departure would likely stem from the lack of safeguards afforded to undocumented workers under the law. The National Labor Relations Act (“NLRA”) and the National Labor Relations Board (“NLRB”) provide some preventive guidelines for undocumented workers in most industries.²¹ Workers in the agriculture industry, however, are left with no protections under the terms of the statute.²² Historically, the United Farm Workers of America’s (“UFW”) support for undocumented migrant workers has been a mixed bag.²³ Cesar Chavez, the iconic founder of the UFW, persistently fought illegal immigration and opposed America’s use of immigrants as cheap farm labor.²⁴ In recent years, the UFW has taken initiatives, such as the “Take Our Jobs” campaign, to encourage U.S. citizens to replace immigrant farmworkers.²⁵

While the UFW’s underlying purpose is to draw attention away from a deportation-only approach to immigration, the organization lacks the national authority held by Congress to improve undocumented immigrants’s workplace rights.²⁶ To accurately discern the best course of action in this national debate, legislators should cut through the rhetoric, examine the facts, and understand the consequences of proposed actions. Legislators must also understand the implications that rigid immigration reform may have on the agriculture sector and sympathize with

²⁰ *Id.*

²¹ National Labor Relations Board, *Immigrant Employee Rights Under the National Labor Relations Act*, https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/immigrant_employee_rights_one_pager_english_pdf_21860.pdf. [<https://perma.cc/ZXQ5-TYYT>].

²² 29 U.S.C.S. § 152 (LexisNexis 2019).

²³ Mark Krikorian, *Hail Cesar!*, NATIONAL REVIEW (Mar. 31, 2017 8:00 AM), <https://www.nationalreview.com/2017/03/cesar-chavez-illegal-immigration-foe/> [<https://perma.cc/PWK5-3BTA>].

²⁴ *Id.*

²⁵ Julián Anguilar, *“Take Our Jobs,” United Farm Workers Challenge*, THE TEX. TRIB. (Jun. 24, 2010, 3:00 PM), <https://www.texastribune.org/2010/06/24/ufw-launches-take-our-jobs-initiative/> [<https://perma.cc/S3JU-3RPB>].

²⁶ *Id.*

the tolls these actions could take on documented or undocumented farm laborers.²⁷

This Note examines the intersection of immigration policy relating to undocumented workers in agricultural labor by studying the impact that undocumented immigrants have on the United States farm labor system, the protections afforded to those farm laborers, and the potential effect of various proposals to the agriculture industry. Part I serves as an overview and background of the agriculture industry in regard to migrant farmworkers. More specifically, Part I details who comprises American farm laborers, the type of labor performed, and their former and current treatment by the NLRB, NLRA, and under United States immigration policy. Part II discusses the labor unions in the agricultural sector, specifically the UFW and its history with migrant laborers. Part III addresses the cross-section of agricultural farm labor and immigration policy by addressing the current agricultural visa program for foreign workers and by identifying proposals offered by Congress, agribusiness, and farm laborers. Part IV presents a workable solution to the migrant farmworker problem through changes in the current work visa program. Furthermore, Part IV asserts that the NLRA must be amended to include protections for agricultural workers (including undocumented farmworkers) and calls on the UFW to continue inclusive and proactive ideology to protect undocumented farmworkers.

I. BACKGROUND

A. *Who are the Farmworkers?*

The United States agricultural industry has changed drastically over the past several decades.²⁸ In the 1950s, the industry boasted over ten million farmworkers who primarily worked on local family farms.²⁹ Now, the industry relies on a select few farms no longer centered around individual families.³⁰ The number of farmworkers has decreased dramatically to only about

²⁷ STEVEN ZAHNISER ET AL., USDA ECON. RES. SERV., THE POTENTIAL IMPACT OF CHANGES IN IMMIGRATION POLICY ON U.S. AGRICULTURE AND THE MARKET FOR HIRED FARM LABOR No. 135 (2012).

²⁸ Dudley, *supra* note 1.

²⁹ *Id.*

³⁰ *Id.*

three million individuals across the U.S.³¹ Of these three million workers, over half are believed to be immigrants.³²

According to 2007-2009 data reported by the National Center for Farmworker Health, 72 percent of all farmworkers were foreign-born.³³ Sixty-eight percent of farm laborers were born in Mexico.³⁴ Thirty-five percent of workers reported that they could not speak any English, and only twenty-eight percent had completed tenth through twelve grades or higher in school.³⁵ This same survey indicated that 48 percent of farmworkers did not have legal authorization to work in the U.S., and only 33 percent reported to be U.S. citizens.³⁶

The labor provided by undocumented workers is vital to the concentrations within the agricultural sector.³⁷ Undocumented laborers play significant roles in the crop farm, dairy, and meat industries.³⁸ For example, dairy farmers in New York and Wisconsin are increasingly reliant on undocumented workers due to the inability to find and keep reliable U.S. citizens to work such undesirable jobs.³⁹ A 2015 study commissioned by the National Milk Producers Federation examined the role of immigrant labor on dairy farms and determined that a decrease in foreign-born workers by fifty percent would result in 3,500 dairy farm closures.⁴⁰ The report further provided that the removal of all undocumented migrant workers would nearly double retail milk prices, costing the United States economy more than \$32 billion.⁴¹ Similarly, many fruit, vegetable, and other crop farmers have stated that a shrinking pool of undocumented workers could cause their farms to shut down.⁴² Will Rodgers of the American Farm

³¹ *Id.*

³² *Id.*

³³ FACTS ABOUT FARMWORKERS, NAT'L CTR. FOR FARMWORKER HEALTH (2012).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Dudley, *supra* note 2.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ FLYNN ADCOCK ET AL., THE ECONOMIC IMPACTS OF IMMIGRANT LABOR ON U.S. DAIRY FARMS, CTR. FOR N. AM. STUD. (2015).

⁴¹ *Id.*

⁴² Jessie Higgins, *Farmers' struggle to legally import workers threatens U.S. crops*, UNITED PRESS INT'L (Sep. 19, 2018 10:02 AM), <https://www.upi.com/Farmers-struggle-to-legally-import-workers-threatens-US-crops/3711537355230/> [<https://perma.cc/G367-CE9G>].

Bureau expressed concern for farm labor needs when stating, "We have a situation where we need laborers, and we don't have the labor we need."⁴³ Without workers, it is not economically feasible to grow the food at all."⁴⁴ Without the help of undocumented workers, the meat industry would also suffer from lower production outputs and higher consumer prices.⁴⁵

American agriculture's reliance on foreign workers for labor is likely a result of immigrants' desire to pursue the "American Dream."⁴⁶ Many migrant farmworkers are lured to the United States to escape extreme poverty, lack of employment, armed conflict, or civil unrest in their home country.⁴⁷ Because many farmworker jobs are dangerous, low paying, and considered "undesirable," the United States agriculture industry struggles to recruit U.S. citizens to fill the necessary job openings.⁴⁸ Rather than improve wages and work conditions, agriculture employers often recruit undocumented workers by promising a better life in the United States.⁴⁹ A study examining immigration in the agribusiness sector found that authorized workers generally accept wages that are eighteen to twenty-two percent higher than their undocumented counterparts, thereby exhibiting the lack of improvement in wages and work conditions for undocumented workers.⁵⁰

B. National Labor Relations Act

In 1935, Congress passed the National Labor Relations Act ("NLRA") to formally establish the legal right of employees to organize and bargain collectively through chosen representatives.⁵¹ The Act officially endows employees with three fundamental rights: organization, collective bargaining, and the

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Dudley, *supra* note 2.

⁴⁶ N.C. Farmworker Inst., *Farmworkers and Immigration*, STUDENT ACTION WITH FARMWORKERS, <https://www.saf-unite.org/content/farmworkers-and-immigration> [<https://perma.cc/AYZ3-QEMP>].

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Ruark, *supra* note 4.

⁵¹ 29 U.S.C.S. § 151 (LexisNexis 2019).

right to engage in peaceful disruption.⁵² In turn, employers required the NLRA to recognize unions in the workplace that are appropriately formed by a qualified majority of their employees.⁵³

1. *Agriculture Exception*

The NLRA created exceptions in the definition of an “employee” protected under the Act.⁵⁴ The legislation explicitly states that employees receiving securities under the Act are limited to “any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer.”⁵⁵ Since agricultural employees are not a protected class of workers under the NLRA, employers in agribusiness are not required to recognize labor unions formed by agricultural employees.⁵⁶ Exempt employees may still technically join labor unions and attempt to collectively bargain with their employers, but their action is not protected under the jurisdiction of the NLRA and its judicial branch, the National Labor Relations Board (“NLRB”).⁵⁷ In turn, in the agricultural business, employer-union relations are permitted to go entirely unchecked.⁵⁸

(a) *Non-Farmworker Undocumented Immigrants Under the Act, Generally*

The National Labor Relations Board has firmly established that undocumented immigrants are considered employees eligible for protection under the NLRA.⁵⁹ Effectively, employees within protected professions have the same rights under the NLRA

⁵² *See id.*

⁵³ *See generally* 29 U.S.C.S. § 152 (LexisNexis 2019) (defining terms within the National Labor Relations Act).

⁵⁴ *See id.*

⁵⁵ *Id.*

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ IMMIGRANT EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT, NATIONAL LABOR RELATIONS BOARD [<https://perma.cc/9FFB-NNZ6>].

regardless of their citizenship status.⁶⁰ As any other employee protected under the Act, undocumented employees may organize a union, take concerted action, and have the choice to take no action at all.⁶¹ Additionally, the NLRB has established that if an undocumented employee chooses to associate or take action with his or her co-workers in order to improve their employment conditions, it is illegal for the employer to use immigration status as a deterrent.⁶²

The rights of collective action only apply to undocumented workers in industries included under the NLRA.⁶³ Due to the NLRA's failure to protect workers in the agricultural industry, neither documented nor undocumented farmworkers can seek refuge under the Act.⁶⁴ However, undocumented workers in industries other than agriculture that the Act recognizes can receive the same protections as United States citizens.⁶⁵

(b) H-2A Temporary Agricultural Worker Program

Specific programs bring agricultural workers into the U.S., such as the H-2A Temporary Agriculture Workers program, which allows American agricultural employers who anticipate a shortage of domestic workers to bring in foreign nationals to the country to fill temporary jobs.⁶⁶ In order to qualify, an employer must offer a job that is impermanent and must demonstrate that there are not enough United States workers who are “able, willing, qualified, and available” to work in the role.⁶⁷ The employer must also show that the employment of the non-resident workers would “not adversely affect the wages and working conditions of similarly employed U.S. workers.”⁶⁸

⁶⁰ *See id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ 29 U.S.C.S. § 152.

⁶⁴ *See id.*

⁶⁵ NLRB, *supra*, note 59.

⁶⁶ *H2A Visa: Learn About H2A Visa Requirements and Eligibility*, VISAPRO IMMIGRATION ATTORNEYS, <http://www.visapro.com/work-visas/h2a-visa/> [<https://perma.cc/E23M-8A4T>].

⁶⁷ *H-2A Temporary Agricultural Workers*, U.S. Citizenship and Immigr. Serv. (Apr. 10, 2020) <https://www.uscis.gov/working-united-states/temporary-workers/h-2a-temporary-agricultural-workers> [<https://perma.cc/H36F-S9ST>].

⁶⁸ *Id.*

The process of bringing in H-2A workers begins with the employer submitting a labor certification to the United States Department of Labor.⁶⁹ After receiving temporary labor certification for H-2A status, the employer or prospective employee submits an I-129 form to the United States Citizenship and Immigration Services.⁷⁰ This form is used by employers or prospective employers to acquire nonimmigrant visa status for a foreign worker.⁷¹

Prospective workers then apply for a visa to seek admission into the United States.⁷² Prospective H-2A employees may apply for an H-2A visa with the United States Department of State and then seek admission to the country with United States Customs Border Protection.⁷³ The process is quite lengthy, costly, and complex for employers because they must pay fees and file applications with multiple government agencies.⁷⁴

Generally, the duration of the employee's H-2A classification is the amount of time authorized on the temporary labor certification.⁷⁵ Qualified arrangements may be extended by one-year increments for up to a maximum of three years.⁷⁶ A new certification must accompany any of these extensions.⁷⁷ A worker who has held an H-2A status for three years must depart the United States and remain outside of the country for at least three consecutive months before seeking readmission into the program.⁷⁸

Some notable features of the current program include the ability to travel in and out of the United States, the option to bring family and other dependents to the United States to live with the employee (if they receive the appropriate classifications), and the ability to change jobs (if a valid offer occurs).⁷⁹ The program also

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ U.S. Citizenship and Immigr. Serv., *supra* note 67.

⁷⁴ Yunita Ong, *The H-2A problem: Why a perfectly legal farmworker visa program isn't being used more*, UNITED PRESS INT'L (Mar. 5, 2015, 6:21 PM), https://www.upi.com/Top_News/US/2015/03/05/The-H-2A-problem-Why-a-perfectly-legal-farmworker-visa-program-isnt-being-used-more/7521425481876/ [<https://perma.cc/JZR2-6NY5>].

⁷⁵ U.S. Citizenship and Immigr. Serv., *supra* note 67.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Meyers, *supra* note 66.

requires employers to pay the workers the same salary as equivalent United States workers.⁸⁰ The rate must be at least as high as the applicable prevailing wage rate or Adverse Effect Wage rate, whichever is higher.⁸¹ The employer must provide free and approved housing for any worker in need.⁸² The employer also must make suitable meal and transportation arrangements for workers.⁸³ Additionally, the employer is required to both guarantee each worker employment for at least three-fourths of the workdays in the work contract period and provide workers compensation insurance.⁸⁴

Notably, however, the program does not provide a path to citizenship for those employees to whom it may appeal, nor does it provide many safeguards for working conditions of the employees.⁸⁵ Along with this, as previously mentioned, the process for employers is complex, expensive, and bureaucratic.⁸⁶

II. EXISTING UNIONS RELATIONSHIPS WITH THE UNDOCUMENTED

A. *Existing Labor Unions*

Founded in 1966, when the National Farm Workers Association and the Agricultural Workers Organizing Committee merged, the United Farm Workers of America (“UFW”) is a well-known, successful labor union consisting of farmers and other agriculture workers in the United States.⁸⁷ The mission of the UFW began in Delano, California, when Filipino and Latino workers, led by Cesar Chavez, began protesting the low pay and poor working conditions they were experiencing while working on

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ U.S. Citizenship and Immigr. Serv., *supra* note 67.

⁸⁶ *See* Ong, *supra* note 74.

⁸⁷ *United Farm Workers of America*, ENCYCLOPEDIA.COM (Mar. 5, 2020), <https://www.encyclopedia.com/plants-and-animals/animals/agriculture-animals/united-farm-workers-america> [<https://perma.cc/8HVW-GWU2>].

the California grape farms.⁸⁸ The nonviolent strike and the organizations rallying cry, “¡Si Se Puede!” (“Yes we can!”),⁸⁹ drew national attention and support.⁹⁰ As the national coverage grew, the strike gained more and more traction.⁹¹ Chavez led a famed 300-mile march from Delano to Sacramento, and Americans nationwide began to boycott the grape industry.⁹² By 1970, the grape boycott and nonviolent strike had become a success.⁹³ In July of 1970, the UFW succeeded in reaching a collective bargaining agreement with the grape farm owners, which resulted in better pay and working conditions for over 10,000 farmworkers.⁹⁴ Today, the UFW continues organizing in major agricultural sectors, chiefly in California.⁹⁵ As of 2014, the UFW had over 10,000 members.⁹⁶

In the Midwest, the Farm Labor Organizing Committee (“FLOC”), AFL-CIO, has a similar mission.⁹⁷ Founded in 1967 by Baldemar Velasquez, FLOC intended to “challenge the deplorable conditions of the broader workforce that remain voiceless, powerless, and invisible to mainstream America.”⁹⁸ In 1978, Velasquez led over 2,000 FLOC members in a strike against Campbell Soup Company (Campbell’s), which refused to recognize the union.⁹⁹ The strike lasted nearly eight years before Campbell’s

⁸⁸ Inga Kim, *The 1965-1970 Delano Grape Strike and Boycott*, UNITED FARM WORKERS (Mar. 7, 2017), <https://ufw.org/1965-1970-delano-grape-strike-boycott/> [<https://perma.cc/BX2W-F69Q>].

⁸⁹ United Farm Workers, *The History of Si Se Puede*, UNITED FARM WORKERS, <https://ufw.org/research/history/history-si-se-puede/> [<https://perma.cc/M98D-PUHA>].

⁹⁰ Kim, *supra* note 88.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ United Farm Workers, *Our Vision*, UNITED FARM WORKERS, <https://ufw.org/about-us/our-vision/> [<https://perma.cc/8LUE-UDUJ>].

⁹⁶ Matt Patterson, *Farmworkers and the New Civil Rights Struggle – Decertification of Bad Unions*, CAL. POL’Y CTR. (Dec. 26, 2014), <https://californiapolicycenter.org/farmworkers-and-the-new-civil-rights-struggle-decertification-of-bad-unions/> [<https://perma.cc/BM52-E2U5>].

⁹⁷ See Farm Labor Organizing Committee, *About FLOC*, FLOC, <http://www.floc.com/wordpress/about-floc/> [<https://perma.cc/K3LK-HWHD>].

⁹⁸ *Id.*

⁹⁹ Gavin Musynske, *U.S. farmworkers win union on farms of Campbell’s Soup, 1978-1986*, Global Nonviolent Action Database (Oct. 10, 2009), <https://nvdatabase.swarthmore.edu/content/us-farmworkers-win-union-farms-campbells-soup-1978-1986> [<https://perma.cc/NKW9-J3VE>].

finally agreed to negotiate with FLOC.¹⁰⁰ Today, FLOC represents over 23,000 farmworkers across the country.¹⁰¹

B. The UFW's history with the Undocumented

The UFW has a checkered past with undocumented workers.¹⁰² Chavez and the UFW's track record with undocumented farmworkers differs among critics and supporters.¹⁰³ The two sides appear to disagree whether the UFW was only against undocumented immigrants when they were breaking strikes¹⁰⁴ or whether the union was against undocumented immigrants as a whole.¹⁰⁵

The struggle between the UFW and undocumented immigrants began with the controversial Bracero Program.¹⁰⁶ The Bracero Program was initiated in 1942 when the United States signed the Mexican Farm Labor Program Agreement, which aimed to legalize and control Mexican migrant farmworkers along the southern border of the United States.¹⁰⁷ The agreement also included wage and living condition guarantees for Mexican farmworkers working in the United States.¹⁰⁸

Chavez was active in opposing the Bracero Program before the establishment of the UFW.¹⁰⁹ The UFW was equally concerned about domestic farmworkers being replaced by cheap labor and of

¹⁰⁰ *See id.*

¹⁰¹ Carol Ehrle, *Farm Labor Organizing Committee Representing 23,000 Workers Endorses the Labor-Community Campaign for an Independent Party*, FOR A PEOPLES PARTY (Nov. 15, 2018), <https://www.forapeoplesparty.org/floc-endorses-new-party/> [https://perma.cc/NMG2-EJJ9].

¹⁰² *See* Frank Bardacke, *The UFW and the Undocumented*, CAMBRIDGE UNIV. PRESS (Spring 2013), https://www.jstor.org/stable/43302716?read-now=1&seq=1#metadata_info_tab_contents [https://perma.cc/CM4W-P3FP].

¹⁰³ *Id.* at 162.

¹⁰⁴ A strikebreaker is one who gets hired to work to replace his/her peers that are partaking in an ongoing strike. *Definition of strikebreaker*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/strikebreaker> [https://perma.cc/2VLY-UNAF].

¹⁰⁵ Bardacke, *supra* note 102, at 162.

¹⁰⁶ *Id.* at 163.

¹⁰⁷ Frank L. Koestler, *Bracero Program*, TEXAS ST. HIST. ASS'N (Jun. 12, 2010), <https://tshaonline.org/handbook/online/articles/omb01> [https://perma.cc/S4VA-89CZ].

¹⁰⁸ *Id.*

¹⁰⁹ Bardacke, *supra* note 102, at 165.

claims that the program “abused” foreign workers.¹¹⁰ After the program ended, the Immigration and Naturalization Service began to issue more green cards to fill former spots of the Bracero workers.¹¹¹ During this time, border security was lax, and more undocumented immigrants than ever before were crossing the border to work in the fields.¹¹² The UFW felt threatened by a less restrictive border policy.¹¹³ At this point in the organization’s history, the UFW consisted of first-generation Mexican-American workers whose parents had migrated to the United States in the 1920s.¹¹⁴ Chavez and these UFW members feared they would be without a job due to the large numbers of undocumented workers coming into the country who could potentially serve as their cheap replacements.¹¹⁵

Because of Chavez and the UFW’s successful lobbying for the termination of the Bracero program, Chavez was confident he could get Congress’ help in stopping undocumented workers from coming into the country through the southern border.¹¹⁶ Starting in 1974, Chavez led a campaign against undocumented farmworkers.¹¹⁷ A UFW petition called on the Justice Department to “remove hundreds of thousands of illegal aliens now working in the fields.”¹¹⁸ Additionally, members tracked down undocumented workers at their work or homes and reported them to the government.¹¹⁹

Most infamously, the union set up a “wet line” at the Mexican border in Yuma, Arizona, where approximately three-hundred UFW members camped out and reported any illegal immigration activity.¹²⁰ The UFW considered themselves border patrol between Arizona and Mexico.¹²¹ The UFW’s “border patrol” openly

¹¹⁰ Oscar Raymundo, *Cesar Chavez and the UFW’s Questionable Tactics*, HUFFINGTON POST (May 31, 2014), https://www.huffingtonpost.com/oscar-raymundo/cesar-chavez-and-the-ufws_b_5065241.html [<https://perma.cc/864E-UFTC>].

¹¹¹ Bardacke, *supra* note 102, at 163.

¹¹² *Id.* at 164.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 165.

¹¹⁷ Bardacke, *supra* note 102, at 166.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 162.

embraced racist language and stereotypes.¹²² Although Chavez was not directly involved, his cousin, Manuel, was a leader in this movement, and UFW headquarters financed some of the activities.¹²³ Initially, the goal of the “wet line” was to prevent strikebreakers from crossing the border to undermine the ongoing UFW labor strikes.¹²⁴ As the program went on, however, the UFW “border patrol” began turning away anyone trying to cross the border whether they were strikebreakers or not.¹²⁵ In fact, Chavez said, “We’re against illegals no matter where they work because if they are not breaking the strike, they are taking our jobs.”¹²⁶

The campaign lasted nearly nine months, ending in early 1975.¹²⁷ When California passed legislation allowing undocumented workers to vote in the upcoming farm worker union elections, the UFW felt it needed to change its policy toward undocumented workers.¹²⁸ Feeling the pressures of needing the undocumented vote for recognition, the union decided to welcome undocumented workers into the union’s membership.¹²⁹ Unfortunately for the UFW, the union lost the vast majority of representative elections across grape farms in California because many undocumented voters voted against the union.¹³⁰

After Chavez’s death in 1994, the UFW promoted pro-immigration campaigns and championed undocumented workers.¹³¹ Unfortunately, the organization lost some of its clout and influence on the national stage.¹³² Despite the decrease in the union’s ability to promulgate national change over the past few decades, it remains the most significant and culturally impactful agriculture union.¹³³

¹²² Raymundo, *supra* note 110; *see also* Bardacke, *supra* note 102, at 162.

¹²³ Bardacke, *supra* note 102, at 166.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 168.

¹²⁸ *Id.*

¹²⁹ Bardacke, *supra* note 102, at 168.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 162.

III. PROPOSALS CONCERNING UNDOCUMENTED FARMWORKERS

A. *What Politicians Have Proposed*

Due to the mainstream prevalence, immigration continues to be a fiery debate leading to many differing views and proposals on how to improve the system.¹³⁴ In 2017, a number of Congressional Republicans supported a bill to overhaul the H-2A visa program and replace it with a new H-2C visa.¹³⁵ Positive and negative changes accompanied the proposed new bill.¹³⁶ In contrast to the current H-2A visa, the new program aimed to cap the number of visas at 450,000 a year and aimed to allow workers to stay year-round.¹³⁷ The proposal would give undocumented workers already working in the United States the opportunity to apply for the program, which they cannot do under the current system.¹³⁸

Additionally, the bill sought to widen the scope of employers who could participate in the program.¹³⁹ Thus, dairy and meat processing farms, who need year-round labor, could import more workers for permanent employment.¹⁴⁰ The proposal, however, eliminated the requirement that employers provide housing and transportation.¹⁴¹ The wage calculation proposed would be based on a percentage of the federal or state minimum wage rather than prevailing wages, and it would result in lower pay for both the United States and migrant workers.¹⁴² Furthermore, the bill had provisions that required money to be withheld from workers's

¹³⁴ Patricia Smith, *The Great Immigration Debate*, N.Y. TIMES: UPFRONT (Feb. 19, 2018), <https://upfront.scholastic.com/issues/2017-18/021918/the-great-immigration-debate.html#1280L> [<https://perma.cc/23FG-AB5M>].

¹³⁵ Kanyakrit Vongkiatkajorn, *The GOP Wants To Bring in More Migrant Guest Workers—But For Much Lower Pay*, MOTHER JONES (Nov. 1, 2017, 5:14 PM), <https://www.motherjones.com/politics/2017/11/the-gop-wants-to-bring-in-more-migrant-guest-workers-but-for-much-lower-pay/> [<https://perma.cc/WW9N-2N9H>].

¹³⁶ See generally *id.* (showing that the bill reforming H-2A has positive and negative consequences of its implementation).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Vongkiatkajorn, *supra* note 135.

¹⁴² *Id.*

paychecks and sent back to their home country in order to guarantee the workers returned to their place of origin.¹⁴³

In 2013, many Democratic members of Congress proposed their own overhaul of the H-2A visa program.¹⁴⁴ Democratic members of Congress announced a similar bill in 2019.¹⁴⁵ The 2013 Democratic proposal would allow undocumented workers who paid a fee, passed background checks, and performed at least 575 hours or 100 workdays of agricultural employment in the United States to be granted “blue-card” status.¹⁴⁶ Blue-card holders would then be allowed to apply for lawful permanent resident status after five years if they have had continued agricultural employment over the period and are up to date on their taxes.¹⁴⁷ Additionally, blue-card holders would be required to pay a fine, pass criminal background checks, and meet certain admissibility requirements.¹⁴⁸ By offering these incentives to agricultural workers, the blue-card system acts as an expedited path to citizenship.¹⁴⁹

The proposal would also create a new, less-skilled agricultural worker visa program that would allow foreign workers who have entered the country to work for employers designated by the U.S. Department of Agriculture to leave those positions and work for other designated agricultural employers.¹⁵⁰ For the first time, this program includes non-seasonal agricultural employers, such as dairy and meat farms, that require labor year-round to operate.¹⁵¹

¹⁴³ *Id.*

¹⁴⁴ Derrick Cain, *House Democrats Offer Bill to Provide Legal Status to Undocumented Farm Workers*, AGRIPULSE (Oct. 2, 2013, 5:45 PM), <https://www.agripulse.com/articles/3290-house-democrats-offer-bill-to-provide-legal-status-to-undocumented-farm-workers> [<https://perma.cc/233U-YGPB>].

¹⁴⁵ Ellyn Ferguson, *Democrats Propose Legal Status for Undocumented Immigrant Farmworkers*, ROLL CALL (Jan. 18, 2019, 4:22 PM), <https://www.rollcall.com/news/congress/democrats-propose-legal-status-immigrant-farmworkers> [<https://perma.cc/RGV8-65XU>].

¹⁴⁶ ANGELA GARCIA ET AL., SENATE AND HOUSE IMMIGRATION REFORM EFFORTS IN THE 113TH CONGRESS: OVERVIEW, SCHOLARS STRATEGY NETWORK 11 (2013), https://scholars.org/sites/scholars/files/ssn_immigration_overview_and_side_by_side_july_2013.pdf [<https://perma.cc/MDW5-7MV5>].

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 13.

¹⁵¹ *Id.* at 11.

In addition, the proposal offers immigrant workers several legal safeguards to protect their rights in the workplace.¹⁵² Under the proposed plan, workers can file federal lawsuits to enforce contractual rights or seek legal assistance and free mediation of any labor disputes.¹⁵³ Although the plan would require these substantive protections for immigrant workers, the Secretary of Labor must decide the specific procedures used to protect these rights.¹⁵⁴ Employers are also required to pay federally determined pay rates, provide free workers' compensation insurance if not covered by state law, and provide housing and transportation to any of their workers that are in need.¹⁵⁵

Aside from protecting the rights of immigrant workers, the plan offers safeguards for workers who are United States citizens.¹⁵⁶ Employers are required to conduct adequate recruitment efforts of American workers before seeking workers under the visa program.¹⁵⁷ The plan also requires employers to submit job postings to American workers sixty days before posting on the foreign job registry.¹⁵⁸ Additionally, the proposal prevents the willful displacement of United States workers and preferential treatment of immigrant workers, regardless of skill level.¹⁵⁹

B. Proposals from Agribusiness

Due to the agricultural sector's necessity for workers, it relies on the immigrant workforce. Simply put, the agriculture sector wants and needs workers more than any other industry.¹⁶⁰ Seventy-two percent of all farmworkers were foreign-born, and sixty-eight percent of them were born in Mexico.¹⁶¹ According to several agriculture groups, the industry's labor shortage in agricultural workers is at a critical level, and more than anything

¹⁵² See GARCIA ET AL., *supra* note 146, at 11.

¹⁵³ *Id.* at 12.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 12–13.

¹⁵⁶ *See id.*

¹⁵⁷ *Id.* at 12.

¹⁵⁸ GARCIA ET AL., *supra* note 146, at 12.

¹⁵⁹ *Id.* at 8.

¹⁶⁰ NAT'L CTR. FOR FARMWORKER HEALTH, *supra* note 33.

¹⁶¹ *Id.*

else, the mass deportation of undocumented migrant workers would cripple the agriculture industries.¹⁶²

An agribusiness coalition, called the Agriculture Workforce Coalition (“AWC”), has constructed a series of immigration policy proposals to help alleviate the labor crisis.¹⁶³ The AWC aims to address the critical shortage of authorized workers facing agribusiness farmers through their plans and their revised visa systems.¹⁶⁴ According to the AWC, the only means of addressing the labor shortages is to reform the “costly, bureaucratic, and highly complicated” H-2A program that is currently in place.¹⁶⁵ The coalition claims that the bureaucracy of the current policy just adds to the myriad problems facing agribusiness.¹⁶⁶

AWC’s proposal has several components.¹⁶⁷ First, the coalition suggests several guest worker programs with no cap on the number of visas allotted.¹⁶⁸ This program considers two options for its execution,¹⁶⁹ both requiring the undocumented worker to make periodic returns to their home country for at least 30 days per visit.¹⁷⁰ However, the AWC proposal provides few worker protections.¹⁷¹ Unlike the previously discussed proposals, the AWC proposal does not contain protections for the wages or working conditions of the potential guest workers, and includes almost no government oversight, leaving employers unchecked, just as they are under the NLRA.¹⁷² Critics of the unchecked power of employers note that it could leave the workers too vulnerable and fearful to speak out about unfair wages and work conditions.¹⁷³

¹⁶² *See id.*

¹⁶³ *The New Agribusiness Immigration Proposal: An Employer’s Wish List*, FARMWORKER JUSTICE, <https://www.farmworkerjustice.org/sites/default/files/FJ%20Statement%20on%20the%20AWC%27s%20Immigration%20Proposal.pdf> [https://perma.cc/L55G-R89N].

¹⁶⁴ *Talking Points for Agriculture Workforce Coalition*, AGRIC. WORKFORCE COAL., http://www.agworkforcecoalition.org/wp-content/uploads/AWC_TalkingPoints_Aug2016.pdf [https://perma.cc/FU9E-ZHE5].

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *See* FARMWORKER JUSTICE, *supra* note 163.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ FARMWORKER JUSTICE, *supra* note 163.

Further, the AWC proposal leaves no free labor market options for workers.¹⁷⁴ Under the proposal, workers have no choice as to which programs they join; instead, employers hire at will.¹⁷⁵ This process means they could be easily let go and replaced, and would no longer qualify for the visa program.¹⁷⁶ For instance, contract workers once in a contractual relationship with an employer are tied to that employer and cannot seek better wages or working conditions.¹⁷⁷

Most notably, the AWC proposal does not offer a clear path to citizenship for immigrant workers.¹⁷⁸ While the proposal allows employees to work indefinitely, contingent on meeting other requirements, it does not provide an option beyond such status to become a citizen in the United States.¹⁷⁹ The proposal mentions a “permanent legal status,” but does not mention lawful permanent residency nor citizenship.¹⁸⁰ To some, this oversight creates a continual underclass of undocumented farm laborers who are not afforded democracy and freedom.¹⁸¹

IV. WORKABLE SOLUTIONS AND A CALL TO ARMS

When trying to reach workable solutions for the farm labor crisis, it is important to consider the sentiments in Part III of this Note.¹⁸² Solutions that accommodate farm owners, foreign workers, and the government are vital to successful change. When considering potential changes to the NLRA, the Act’s stated purposes should be effectuated as best as possible. It is also crucial to consider the desires of undocumented laborers. Undocumented farmworkers often come from vulnerable populations who were living in poverty in their home countries.¹⁸³ Foreign workers often come to the United States to pursue a better life than they were

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *See id.*

¹⁷⁹ FARMWORKER JUSTICE, *supra* note 163.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *See supra* Part III.

¹⁸³ *Farm Workers & Immigration*, NAT’L FARM WORKER MINISTRY,

<https://nfwm.org/resources/farm-workers-immigration/> [[https://perma.cc/T3GJ-](https://perma.cc/T3GJ-ASS7)

experiencing in their home country, which is not necessarily by choice.¹⁸⁴ Many farmworkers experience challenges and discrimination within the workplace.¹⁸⁵

A. Changes to the Visa Program

The visa program in its current form is flawed and widely criticized by politicians, workers, and employers.¹⁸⁶ A new proposal should aim to appease all the parties involved as best as possible. The following sub-sections contain key proposals that should be included in any proposed overhaul of the H-2A visa program.

1. Extension of the Program to Non-Seasonal Agricultural Employers

In its current form, the H-2A program can only be utilized by seasonal or temporary employers.¹⁸⁷ It has been well documented that a large portion of non-seasonal agribusiness relies on immigrant farm labor as much as seasonal farms.¹⁸⁸ Dairy and meat farms have expressed similar needs for immigrant labor to keep their businesses afloat.¹⁸⁹ These farmers need workers year-round due to the nature of their business.¹⁹⁰ There is no legitimate reason not to include employers who offer year-long, permanent employment on dairy and meat farms in the H-2A program. Unlike crop farms, dairy and meat farms do not have an offseason.¹⁹¹ Like crop farms, they are extremely reliant on immigrant workers, they experience labor shortages, and they

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Muzaffar Chishti and Jessica Bolter, *Despite Political Resistance, Use of Temporary Worker Visas Rises as U.S. Labor Market Tightens*, Migration Policy Institute (June 20, 2017), <https://www.migrationpolicy.org/article/despite-political-resistance-use-temporary-worker-visas-rises-us-labor-market-tightens> [<https://perma.cc/ZV5S-6P58>].

¹⁸⁷ See Jeff Daniels, *Immigration reform to ease farm labor crunch could face new and unexpected hurdles*, CNBC (Jun. 19, 2018, 4:35 PM), <https://www.cnbc.com/2018/06/19/immigration-reform-to-ease-farm-labor-crunch-face-new-obstacles.html> [<https://perma.cc/ZV79-W4MH>].

¹⁸⁸ Dudley, *supra* note 1.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

would be crippled by a mass exodus of immigrant laborers from the market.¹⁹²

Including these more permanent employers in the H2-A program has a number of benefits.¹⁹³ First, employers could better keep their businesses adequately staffed and running, thereby helping to solve the labor crisis.¹⁹⁴ Second, including permanent employers creates more jobs for foreign workers who wish to come to the United States.¹⁹⁵ It also would allow workers a larger marketplace of jobs where foreign workers would have options and could work in a role that best suits their skills and interests.¹⁹⁶

2. *A Path to Permanent Legal Status and Citizenship*

An expedited and straightforward path to citizenship should be a key component of any new visa plan. When a worker has cleared the hurdles of applying for and finding employment through the visa program, they should immediately be given temporary legal status and put on a path to permanent legal status and citizenship.¹⁹⁷ The visa worker should be granted legal permanent residence after remaining in the United States for three years, and after maintaining agricultural employment, keeping a clean criminal record, and paying taxes and other fees. The worker could then apply to become a citizen of the United States after three years as a legal permanent resident totaling to a six-year requirement if in good standing.

Allowing a quick and easy path to permanent residence and citizenship is incredibly beneficial for employers and immigrant workers as it promotes stability and avoids a high level of turnover.¹⁹⁸ Workers could have the confidence to build a foundation in the United States without fear of deportation or

¹⁹² *Id.*

¹⁹³ See Roy Maurer, *Employers to Benefit from Plans to Modernize H-2A Visa Program*, SHRM (July 26, 2019), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/dol-proposes-modernize-h2a-visa-program.aspx>. [<http://perma.cc/KMP6-9RPX>].

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See THE WHITE HOUSE, *MODERNIZING & STREAMLINING OUR LEGAL IMMIGRATION SYSTEM FOR THE 21ST CENTURY* 15 (2015).

¹⁹⁸ *Id.* at 29.

abrupt changes to their employment or familial lives.¹⁹⁹ There is also a societal benefit to allowing a simple path to citizenship.²⁰⁰ If a visa worker has been cooperating with the appropriate agencies, performing in their employment, paying taxes and fees, and maintaining a clean record, then they have demonstrated that they are a valuable asset to the United States as well as their communities. As a country, the United States should seek a citizenry of valuable contributors to society.²⁰¹

3. *Other Key Propositions Concerning a Visa Overhaul*

Like the Democrat's proposal, visa workers should have access to legal representation whenever workplace or employer disputes arise.²⁰² Additionally, employers should provide workers compensation insurance for immigrant employees. The worker's wages and benefits should adhere to federal and state minimum and prevailing wage laws, whichever is higher, and employers must provide the same wage scale and benefits offered to similarly situated United States citizens.²⁰³ Inequality and discrimination against visa workers should be avoided in the workplace.²⁰⁴ Thus, these protections are necessary to place visa workers on a level playing field with nonimmigrant workers.

Despite the fact that most proposed plans require visa workers to return to their home country for a specified time after working in the United States,²⁰⁵ there is no compelling reason for this requirement, especially when considering non-seasonal employers. Not only does the requirement lack validity, it also

¹⁹⁹ *See id.*

²⁰⁰ *Id.*

²⁰¹ *See generally id.* (suggesting that by creating stability for these individuals they will become better contributors to American society).

²⁰² *See generally* Cain, *supra* note 144 (referencing the Democrats proposal to add legal status to undocumented workers to support the conclusion that visa workers should have better legal representation).

²⁰³ *See* THE WHITE HOUSE, *supra* note 197, at 4.

²⁰⁴ *See generally id.* (suggesting methods to limit inequality and discrimination as proposed by the Obama Administration).

²⁰⁵ *See, e.g., H-2B Temporary Non-Agricultural Workers: Period of Stay*, U.S. CITIZENSHIP & IMMIGRATION SERV., <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers> [<https://perma.cc/VR4U-YCLA>].

unduly burdens the visa worker.²⁰⁶ For example, if a Mexican visa worker has made his way to Wisconsin to work on a dairy farm or to Washington state to work on an apple orchard, the required travel costs would be expensive but would also cause the worker to lose out on wages as well.²⁰⁷ This requirement further disrupts day to day operations on farms since employers must either slow down operations or make up for the lost labor by hiring temporary replacements.²⁰⁸ Therefore, this requirement should be removed from the visa program.

Also, there should not be a fixed cap on the number of visas issued. Every three years, the United States Department of Labor should assess the demand for agricultural labor in the United States and set a generous cap that would satisfy this demand. The assessment should be cognizant of both the demand for labor and the number of foreign workers who would likely apply for the program. There should be ample opportunity for nearly anyone who qualifies and desires to work an agricultural job in the United States to do so.

The program should contain certain protections for United States workers as well. Oversight from the Department of Labor is necessary to ensure agricultural employers are not taking advantage of the system by willfully displacing American workers for cheaper labor by immigrant workers.²⁰⁹ Additionally, the requirement that employers show an actual shortage of labor is a requisite for being included in this proposed program.²¹⁰ Employers must show that there are not enough American workers to staff their businesses before they can get visa workers.²¹¹ The purpose of the visa program is not to replace American workers or take jobs that American workers would otherwise fill.²¹² Therefore, it is of paramount interest that American workers have adequate notice of the availability of jobs before foreign workers obtain them.

²⁰⁶ See generally THE WHITE HOUSE, *supra* note 197 (referencing the White House report for support).

²⁰⁷ See *id.*

²⁰⁸ See *id.*

²⁰⁹ See *id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See THE WHITE HOUSE, *supra* note 197.

4. *Amending the NLRA to Provide Labor Rights for Agricultural Workers*

Since its inception, the NLRA has excluded its protections for agricultural workers in the United States.²¹³ Agricultural workers may still organize, but the law does not require employers to recognize a unionized workforce.²¹⁴ Agricultural employers can place workers in harsh working conditions and pay them lower wages because of the worker's statutorily imposed inability to bargain. A changing agricultural landscape has seen the industry move away from family farms toward large scale businesses that often take advantage of their workforce.²¹⁵ Agricultural employers can unilaterally impose their wills on workers, and those workers have virtually no statutorily defined mechanism to challenge their employers.²¹⁶ This is unacceptable.

In the legislative history of the NLRA, the primary principles for excluding agricultural workers from protection were that Congress believed the NLRA should not have jurisdiction over family farms because these farms were not engaged in interstate commerce, a requisite for NLRA jurisdiction.²¹⁷ Additionally, Congress felt the exclusion of farm laborers would benefit economically struggling family farms who were a "vulnerable fixture in the American economy."²¹⁸ In today's agricultural landscape, family farms are no longer the key players, and instead, large scale agribusinesses are powerful employers in agriculture.²¹⁹ These businesses are unquestionably engaged in interstate commerce by supplying the clear majority of food and dairy to most of the United States.²²⁰

²¹³ 29 U.S.C.S. § 152 (LexisNexis 2019).

²¹⁴ 29 U.S.C.S. § 151 (LexisNexis 2019).

²¹⁵ Dudley, *supra* note 1.

²¹⁶ *See generally id* (suggesting that employers can enact their will on undocumented workers because of their legal status).

²¹⁷ Jaclyn Reilly, *Agricultural Laborers: Their Inability to Unionize Under the National Labor Relations Act*, PA. ST. U. DICKENSON SCH. L., at 5, https://pennstatelaw.psu.edu/_file/aglaw/Publications_Library/Agricultural_Laborers.pdf [<https://perma.cc/3HFQ-BUNE>].

²¹⁸ Michael H. Leroy & Wallace Hendricks, *Should "Agricultural Laborers" Continue to be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489, 491 (1999).

²¹⁹ *Id.*

²²⁰ *See generally id* (showing that by shipping food products across state lines agricultural workers have placed themselves within interstate commerce).

Congress must act to amend the NLRA and abolish the agricultural exception. The reasons for excluding them in the first place have grown stale and outdated. By including agricultural workers as “employees” under the law, employers would be required to recognize unions that have shown majority support from their bargaining unit.²²¹ There would be many benefits under this proposed change. Workers could bargain on their behalf for fair working conditions, and farm labor would hold more appeal to laborers, which would, in turn, lessen the effects of the labor shortage in agriculture.²²² Undocumented farm laborers would then have the same rights under the NLRA as their American counterparts since the NLRA recognizes the same rights for undocumented workers as for American workers.²²³

5. *A Call to Farm Labor Unions*

Although the UFW and FLOC do not have the political capital of their yesteryears, these organizations must be proactive in their support and inclusion of foreign workers. Both the UFW²²⁴ and FLOC²²⁵ have taken a pro-immigrant stance in recent years, but this is not enough for serious change. The UFW and FLOC should work with the Department of Labor to reach more undocumented immigrants and assist them in receiving work visas. The UFW and FLOC should actively reach out to struggling employers about receiving immigrant farm labor. These unions should also actively reach into border countries and make potential workers aware of their options in the United States. This effort would benefit workers, employers, and unions by increasing membership.

Additionally, the UFW and FLOC should be lobbying in Congress for the proposed changes to the NLRA mentioned in the previous section. Should the UFW and FLOC include agricultural workers, the organizations would certainly see their membership skyrocket. Agricultural employers would be required to recognize

²²¹ See 29 U.S.C.S. § 151 (LexisNexis 2019)

²²² See THE WHITE HOUSE, *supra* note 197, at 8.

²²³ See 29 U.S.C.S. §§ 151–169 (LexisNexis 2019).

²²⁴ Anguilar, *supra* note 25.

²²⁵ Ehrle, *supra* note 101.

the unions when they satisfactorily show majority support,²²⁶ which would help establish the legitimacy of the unions and lead to better membership. The greater memberships would allow these unions to effectuate their purposes of promoting better pay and workplace conditions for farmworkers. In short, agriculture unions should be quick to embrace both undocumented workers and visa workers. The unions should actively assist in the administration of the visa program and lobby to amend the NLRA to include protections for the agriculture industry.

CONCLUSION

The agriculture industry in the United States is facing a labor crisis.²²⁷ In a time of heightened rhetoric over the immigrant debate, agribusiness has become incredibly dependent on undocumented workers to fill jobs that remain left open by American workers.²²⁸ At the center of this crisis is the intersection of United States immigration policy and United States labor policy.²²⁹ To combat the labor shortage,²³⁰ the United States must improve the current agricultural visa program to bring in more foreign workers and put them on an expedited path to citizenship. In order to stabilize the workforce, the visa program must include protections and accommodations for visa workers that allow them to have adequate pay, working conditions, and living arrangements. Allowing workers to continue uninterrupted by mandatory exits from the country and by offering a less complicated path to citizenship allows employers to be able to rely on a stable workforce both in day-to-day operations and in the long term.

Foreign workers should obtain protections provided by the NLRA, regardless of the documentation status. The NLRA policy of excluding agricultural workers²³¹ is not only dated but unfair. Therefore, Congress must change this policy and allow agricultural

²²⁶ 29 U.S.C.S. § 159 (LexisNexis 2019).

²²⁷ Duvall, *supra* note 6.

²²⁸ Dudley, *supra* note 1.

²²⁹ *See* THE WHITE HOUSE, *supra* note 197.

²³⁰ *See generally id* (suggesting that immigrants help strengthen the labor shortage).

²³¹ *See, e.g.*, National Labor Relations Board, *supra* note 21; 29 U.S.C.S. § 152 (LexisNexis 2019).

employees who choose to organize through a union to receive the key protections offered by the Act. Amending the Act would be a way to stabilize the dwindling workforce and improve working conditions and pay scales for both American and foreign farm laborers.

Agricultural labor unions should be on the frontline fighting for undocumented and visa workers. Foreign workers make up a large portion of the agriculture workforce,²³² and farm unions must lobby on their behalf, promote their interests, and work to get them to become members of the unions. The UFW and FLOC must launch aggressive campaigns to recruit undocumented and visa workers into their membership. It is time for UFW and FLOC to tap into the fighting spirits of their past²³³ and amp up current operations. These unions should be the most aggressive in lobbying for the proposed amendment to the NLRA because it would allow them to gain recognition from employers, thus increasing their involvement. Finally, all citizens in the United States should consider the importance that foreign workers have on the country's food supply.²³⁴ Immigrant workers are the backbone of the agricultural industry,²³⁵ and Americans need to be cognizant of the harsh working conditions and obstacles these individuals encounter and fully embrace the fight to end such extremities.

²³² Dudley, *supra* note 1.

²³³ See Anguilar *supra* note 25.

²³⁴ Dudley, *supra* note 1.

²³⁵ *Id.*